The charge in *DeLima* v. *Trinidad Corporation* (C.A. 2-1962), 302 F. 2d 585, contained the common law definition of proximate cause quoted at page 9 of the petition. In that case the trial court refused to charge the jury that "if the employer's negligence 'played any part, even the slightest, in producing an injury to plaintiff, the plaintiff may recover.'" 302 F. 2d at 587. The charge included only the definition quoted by petitioner. Like *Page*, above, the charge did not include any reference whatever to "in whole or in part." Moreover, the judgment in *DeLima* was reversed on numerous other grounds.

Ely v. *Reading Company* (C.A. 3-1970), 424 F. 2d 758, cited but not commented on by petitioner, also affirmed judgment for the defendant on a jury verdict in a death case notwithstanding that the charge required negligence to be the proximate cause of the accident when the charge also directed a plaintiff's verdict, if the death "resulted in whole or in part from the employer's negligence." 424 F. 2d at 762.

Stacey v. *Sea-Drilling Corporation* (C.A. 5-1970), 424 F. 2d 1272, also cited but not commented on, and arising under the Jones Act, found no reversible error in reference to proximate cause with respect to burden of proof when the charge in other parts stated that there was liability if negligence "played any part, even the slightest."

This petition for certiorari presents for decision no issue of national importance not heretofore fully decided and no conflict of decision whatever. The petition merely seeks another hearing on the facts of this particular case, with which this Court, we submit, is not concerned.

THE CHARGE IN THIS CASE

Petitioner concedes that "the court did indicate that the railroad would be responsible for its negligence in whole or

in part (App. 4, 5) and acceptably defined causation (App. 7a and 8a)." Petition, p. 4.

That concession, however, does not adequately or fairly convey the initial and repeated emphasis of the charge that the plaintiff must recover if Hamilton's death resulted "in whole or in part from such failure" to furnish a safe place to work; again, if "Hamilton was killed as a result of the negligence of the defendant railroad company, either in whole or in part"; and again, "if you should further believe that such negligence, if any, contributed to cause or contributed to the death of Frank Hamilton." App. 3-4; App. on Appeal, 4-5.

The charge also quoted in its applicable parts Sec. 54 of the Federal Employers' Liability Act, absolving the plaintiff from assumption of risk where injury "resulted in whole or in part from the negligence of any officers, agents, or employees of such carrier." 45 U.S.C. § 54. App. 5; App. on Appeal, 6.

The first mention of proximate cause occurs in the statement of the burden of proof: first, to prove negligence, and, second, that such negligence "was a proximate cause of any injuries and consequent damages sustained."[*]

This mention of proximate cause is immediately followed by the definition of proximate cause taken from Mathes and Devitt, *Federal Practice and Instructions*, § 84-12, p. 517 which is conceded by petitioner to have "acceptably defined causation" (Petition, p. 4):

> "An injury is proximately caused by an act or omission whenever it appears that the act or omission *played any part, no matter how small*, in actually bringing about or causing the injury. So if you find from the evidence that *any negligence* on the part of

[*] There is no restriction to *the* proximate cause.

> the defendant *contributed in any way or manner* toward any injury suffered by plaintiff, you may find that injury was proximately caused by that defendant's act or omission." App. 6; App. on Appeal, pp. 6-7. Italics supplied.

The charge also later states, but once only, that proximate cause means "that the accident was a natural and probable consequence of such negligence." App. 8; App. on Appeal, p. 9. That is a completely correct statement and is in no way either a limitation upon or inconsistent with any requirement of the Federal Employers' Liability Act.

The charge concludes with a summary, expressly predicated upon the trial court's prior "definitions as to preponderance of the evidence, as to contributory negligence, as to the burden of proof, proximate cause and other matters," as follows:

> ". . .: First, if you find the railroad was not at fault; they are out. If you find that they were at fault, and that Mr. Hamilton was not at fault, then the verdict should be against the railroad for whatever amount you think is proper. But then the third thing is that if you find that both were at fault, then you set down in your deliberate wisdom, . . . and then come up with what you think is the proper decision in the case." App. 12, 13; App. on Appeal, pp. 13, 14.

The charge must be considered as a whole.* The charge does not in any respect fail to convey the standard for recovery fixed by the Federal Employers' Liability Act.

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* *Petapsco Ins. Co.* v. *Southgate*, 30 U.S. 604, 621, 8 L. Ed. 243, 250; *Baltimore and Potomac R. Co.* v. *Mackey* (1894), 157 U.S. 72, 86-87, 39 L. Ed. 624, 629, 15 S. Ct. 491, 495; 53 Am. Jur., Trial, Sec. 842, p. 618.

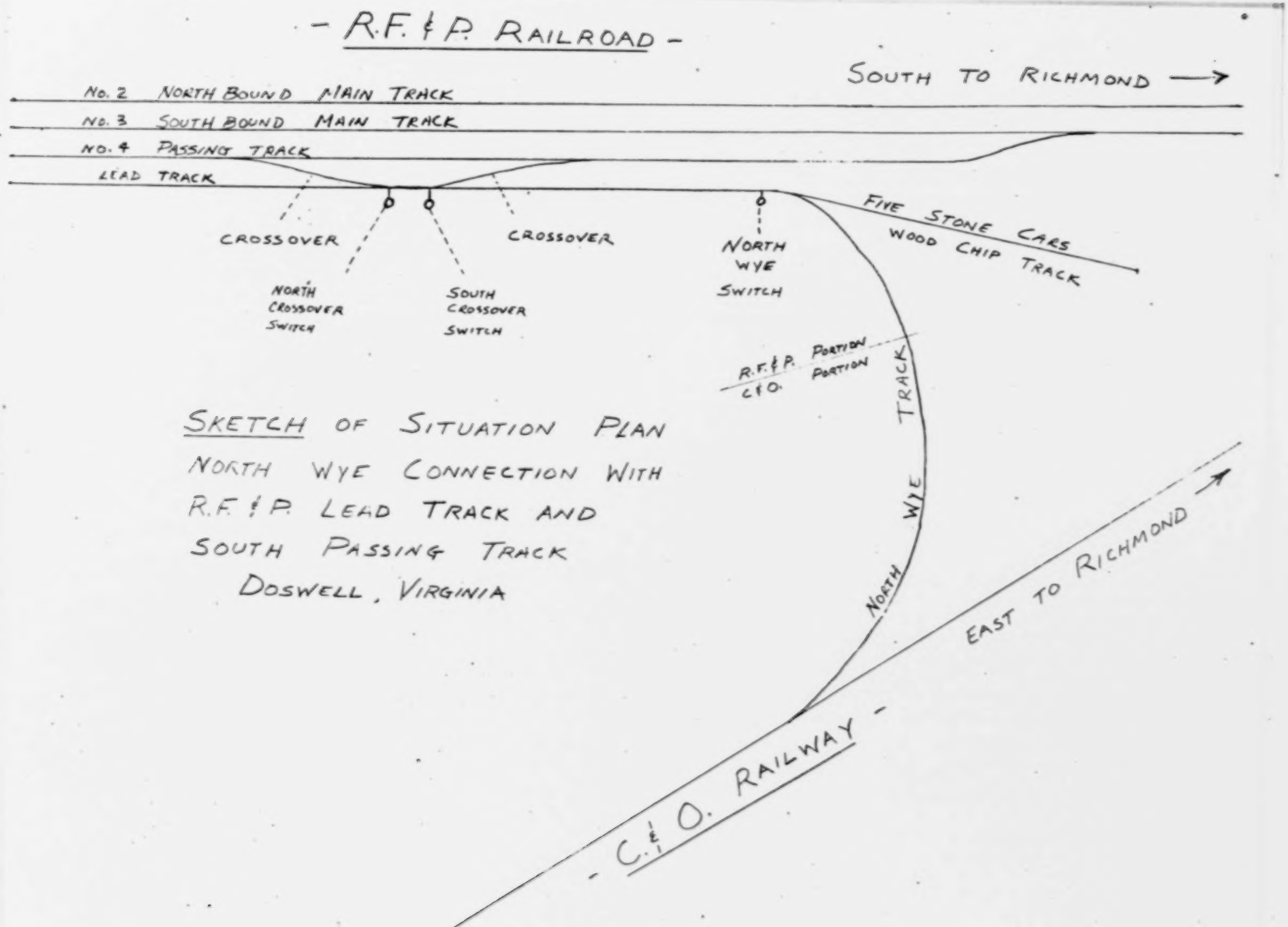
CONCLUSION

The charge in this case did convey to the jury "that the employee is entitled to recover if employer negligence played any part, even the slightest, in producing the injury," as petitioner phrases the requirement in the conclusion of her petition.

Certiorari should be denied.

Respectfully submitted,

AUBREY R. BOWLES, JR.
AUBREY R. BOWLES, III
901 Mutual Building
Richmond, Virginia 23219
Counsel for the Respondent, The Chesapeake and Ohio Railway Company


- R.F. & P. RAILROAD -
SOUTH TO RICHMOND →
No. 2 NORTH BOUND MAIN TRACK
No. 3 SOUTH BOUND MAIN TRACK
No. 4 PASSING TRACK
LEAD TRACK
CROSSOVER
CROSSOVER
NORTH CROSSOVER SWITCH
SOUTH CROSSOVER SWITCH
NORTH WYE SWITCH
FIVE STONE CARS
WOOD CHIP TRACK
R.F. & P.
C & O.
PORTION
PORTION
NORTH WYE TRACK
EAST TO RICHMOND
- C. & O. RAILWAY -
SKETCH OF SITUATION PLAN
NORTH WYE CONNECTION WITH
R.F. & P. LEAD TRACK AND
SOUTH PASSING TRACK
DOSWELL, VIRGINIA